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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1185

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner, Gussie Joffe, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in this proceeding on October 9, 1967.

OPINIONS BELOW

The per curiam decision of the Supreme Court of New Jersey, affirming the judgment of the Appellate Division for the reasons expressed in the Appellate Division's opinion, is

reported at 50 N.J. 265 and at 234 A.2d 232 at 233; it is reprinted in Appendix A hereto, p. A-1, *infra*. The opinion of the Appellate Division also appears at 50 N.J. 265 and at 234 A.2d 232 and is reprinted in Appendix A hereto.

The opinion of Judge Concilio of the Superior Court of New Jersey, dated August 24, 1964, is unreported; it is reprinted in Appendix B hereto, p. B-1, *infra*. The unreported contempt order of October 20, 1964, signed by Judge Duffy of the Superior Court of New Jersey, together with the unreported contempt order of November 12, 1964, signed by Judge Nimmo of that court, are also reprinted in Appendix C hereto, p. C-1, *infra*.

JURISDICTION

The final judgment of the Supreme Court of New Jersey, affirming the contempt orders, was entered on October 9, 1967. A timely petition for rehearing was denied by that court on October 31, 1967. On January 16, 1968, Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including March 1, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Full Faith and Credit Clause of the United States Constitution permits a New Jersey court to deny full faith and credit to prior jurisdictional and substantive rulings of a New York court in a separation, alimony and custody proceeding because of the New Jersey court's conclusion, rendered upon its own reexamination of the New York record, that the New York court erred in asserting in *personam* jurisdiction over the defendant spouse, where

(a) The New York jurisdictional rulings were rendered after full and fair hearings, no fraud being suggested or alleged,

(b) The defendant spouse concededly made special appearances in the New York court to challenge jurisdiction over his person and the subject matter of the action, as a result of which hearings were had and repeated rulings were made that the New York court had jurisdiction over both his person and the subject matter of the action, and

(c) The defendant spouse made what the New York court determined to be a general appearance and submission to its *in personam* jurisdiction, said determination having been made after a full and fair hearing on this question.

2. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, a litigant may be found in civil contempt of a state court and fined and threatened with imprisonment for failure to obey court orders restraining the litigant from proceeding further in the court of another state where (a) the latter court had determined, after full and fair hearings, that it had jurisdiction over the parties and the subject matter, and (b) the orders and judgments of the latter court were entitled to full faith and credit.

3. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, a state court may punish a mother, found guilty of civil contempt for failure to obey certain court orders unrelated to the custody of her child, by ordering the transfer of the custody of her minor child from her to the father.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Sec. 1: No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . .

United States Constitution, Art. IV, Sec. 1: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Rec-

ords and Proceedings shall be proved, and the Effect thereof.

United States Code, Title 28, § 1738: Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

New York Civil Practice Act, Sec. 237: Defendant's appearance. The defendant's appearance must be made by serving upon the plaintiff's attorney within twenty days after service of the summons exclusive of the day of service, a notice of appearance, a copy of an answer or a notice of motion raising an objection to the complaint in point of law. A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him.

New York Civil Practice Act, Sec. 237-a: Defendant's special appearance. 1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the Court's jurisdiction over his person. Such objection, whether based on the ground that process or its service is insufficient or that the defendant is a person not subject to the jurisdiction of the court must be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection, if raised in a manner other than that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived.

2. An objection to the court's jurisdiction over the person of the defendant shall not be waived by joining therewith a motion objecting to the court's jurisdiction of the subject matter.

3. If the plaintiff on the hearing of the motion shall by affidavit deny the facts alleged by the defendant or state facts tending to obviate the objection, the court may:

(a) hear and determine the objection and where the court has no jurisdiction over any cause of action stated in the complaint, the court shall order the service set aside; however, where process and its service are sufficient to give the Court jurisdiction over one or more of the causes of action stated in the complaint, the court shall order struck out of the complaint such part of it, including all or part of a prayer for relief, as is beyond the court's jurisdiction, in which case, the complaint will be deemed amended accordingly, or the court may order an amended complaint to be served; or

(b) direct that the question of fact, which shall be clearly and succinctly stated in the order, be tried by a jury or referee, the findings of fact of which shall be reported to the court for its action; or

(c) overrule the objection and in its discretion allow the same facts to be alleged in the answer as a defense.

STATEMENT OF THE CASE

In punishment for her civil contempt of court, the New Jersey judgment below as to which review is here sought has ordered the petitioner wife (1) to take all necessary steps to vacate virtually all orders or judgments previously obtained by her in New York, (2) to pay to the court clerk fines totaling over $3000, (3) to be committed to the Passaic County Jail unless and until she vacates the orders and pays the fines, and (4) to be deprived of the custody of her child, contrary to the previous order of the New York court.

Underlying that contempt judgment is the ruling of the Superior Court of New Jersey, affirmed in all respects on appeal, that "full faith and credit need not be given to the proceedings commenced by the . . . [wife] in the Supreme Court of New York as the . . . [husband] was never served

with process in New York, never appeared generally, nor did he actively participate or argue the merits of that action." See p. B-23, *infra*. Thereby rejected and set to naught were repeated New York rulings finding jurisdiction to exist over both the person of the husband and the subject matter of the wife's suit.

Such rulings had been entered after full and fair hearings on the jurisdictional issues. They were entered as the result of both special and general appearances by the husband wherein he challenged the jurisdiction of the New York court. The special appearances were concededly made. But the general appearances were found by the New York court, after a hearing directed solely to that issue and after a thorough review of the entire proceeding, from the established fact that the husband (1) had participated so actively on the merits of the New York action as to constitute a general appearance therein under New York law, and (2) had therefore submitted himself generally to the jurisdiction of the New York court, "conferring in personam jurisdiction over his person in the within action." See p. F-6, *infra*.

The contempt judgment, of course, is but one element in a prolonged, complex and at times bitter marital dispute between the husband and wife. That dispute has been augmented by differences as to the custody and support of their minor son, an intellectually gifted child who suffered from a form of hereditary blindness and who was in need of urgent medical attention and special schooling. The two had been married in 1955, first in a civil ceremony in New Jersey and then in a large religious and civil ceremony in New York. The petitioner wife at all times has been a practicing attorney with offices in New York City, while the respondent husband has been a practicing physician in New Jersey. The husband had four children by a previous marriage. The child of these two parties had been born in New Jersey in 1958 and has lived in New York at nearly all times.

The parties have long been in dispute as to whether their principal home was intended to be in New York or in New Jersey; and the wife has long maintained that the husband was in fact domiciled in New York during the marriage and that he intended and wanted to leave New Jersey due to the local notoriety attending his relationship with and divorce from his first wife. The New York courts found, however, that the wife had satisfied the statutory requirements with respect to New York residence so as to enable her to maintain suit in New York for separation, custody and alimony. See p. D-1, *infra*. The New Jersey courts, at the same time, found that the husband was a resident of New Jersey and as such entitled to institute a somewhat similar action in the courts of that state. See p. B-7, *infra*.

The record is clear that the petitioner wife at no time abandoned her New York residence or domicile. At all times she filed her federal and state tax returns in New York and was permanently registered in New York as a voter. She has constantly maintained law offices in New York City and has resided there both before and subsequent to the separation from her husband. Indeed, the husband resided with her in the New York City apartment for substantial periods of time prior to the separation, moving much of his furniture to that apartment after closing and selling some of his New Jersey residential properties. The child has resided with the petitioner wife in New York City substantially all the time before and at all times following the abandonment of the wife and child by the husband in May of 1962.

Out of this situation arose two series of legal actions, the first being instituted by the wife in the New York courts and the second being started by the husband in the New Jersey courts. The full faith and credit problems and the due process issues resulting from these competing lawsuits can best be revealed by a comparative chronology of legal events, derived from the certified record before this Court:

New York Supreme Court

(1) June 21, 1962: Wife filed complaint seeking (a) separation from husband, (b) permanent alimony and support, (c) counsel fees, and (d) custody of child. Service effected on husband in New Jersey pursuant to § 235 of New York Civil Practice Act, permitting such service in a separation action.

(2) June 21, 1962: Justice Conlon issued sequestration order attaching all assets of husband in New York (including his furniture) and appointing a receiver thereof. This order was served on husband in New Jersey pursuant to court authorization.

(3) July 12, 1962: Justice Flynn issued order granting temporary custody of child to the wife pending further hearing and restraining husband from entering the Montclair, N. J., home to carry off or dispose of property therein. Husband also ordered to show cause why temporary custody should not be awarded wife pending trial, why *pendente lite* alimony of $500 per week should not be granted for support of wife and child, and why $5000 counsel fees should not be awarded wife to prosecute separation action. On July 22, the return day of this order, the husband appeared through New York counsel to seek an adjournment of the matter.

(4) Aug. 8, 1962: Order issued to husband to show cause why moneys should not be withdrawn

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New York Supreme Court **New Jersey Superior Court**

from sequestration to pay taxes and mortgage installments on Montclair property and to pay for support of child.

(5) Aug. 14, 1962: Husband, appearing "specially" through New York counsel, filed motion "for an order vacating and setting aside the summons and complaint and order to show cause, pursuant to Section 237-a of the Civil Practice Act on the ground that this Court does not have jurisdiction of the subject matter of this action and that defendant is a person not subject to the jurisdiction of this Court and for such other and further relief as may seem just and proper in the premises." Accompanying affidavit of husband argued merits of alimony complaint and motion. [*Justice Backer later held this to be a general appearance; see (20) below.*]

(6) Aug. 17. 1962: Husband through New York counsel obtained adjournments of hearings on all pending motions. [*Justice Backer later held this to be a general appearance; see (20) below.*]

(7) Aug. 22, 1962: Husband filed an affidavit seeking a stay of temporary order of Aug. 8 [(4) above] respecting payment of taxes and mortgage installments on the ground that he had been advised that the wife "has made the necessary current payments to the bank so that there is no immediate danger of foreclosure." [*Justice Backer later held this to be a general appearance; see (20) below.*]

All of these general appearances of husband in New York occurred prior to effective institution of his New Jersey action.

New York Supreme Court	New Jersey Superior Court
	(1) Aug. 23, 1962: Wife personally served in New Jersey with complaint, which had been filed by husband on Aug. 17, seeking (a) custody of child or visitation rights and (b) replevin of furniture located in New York. The child at this point was in New York in the custody of the wife pursuant to New York court decrees, and the furniture had previously been attached by the New York receiver under the New York sequestration order.
(8) Aug. 27, 1962: Husband's counsel argued merits of all pending motions, relying in part on husband's affidavit asking for stay of order directing receiver to make tax and mortgage payments (see (7) above) and arguing against need for immediate foreclosure. Court decision reserved. [*Justice Backer later held this to be a general appearance; see (20) below.*]	**(2) Aug. 27, 1962:** Husband obtained ex parte order to show cause, returnable Sept. 21, 1962, why sale of furniture should not be restrained until final hearing of action. Order also contained interim restraint of such sale until hearing on order to show cause.
(9) Sept. 5, 1962: Order signed compelling husband to show cause why New Jersey action should not be restrained; interim order issued restraining husband from proceeding in New Jersey.	
(10) Sept. 17, 1962: Justice Klein issued decision denying husband's motion to vacate service of process (see (5) above), ruling that "although there appears to be some conflict with respect to exactly where the parties maintained their principal residence, if any, sufficient competent proof had been set forth herein to readily indicate that plaintiff [the wife]	

New York Supreme Court

satisfies the jurisdictional requirements with respect to New York residence outlined in section 1165a, subdivision 3 of the Civil Practice Act." See Appendix D hereto, p. D-1, *infra*.

(11) Sept. 19, 1962: Husband's attorney moved to reargue motions respecting alimony, counsel fees, withdrawals from sequestered funds, and service of process. Claim here made that an award of support could not be made independently of award for alimony *pendente lite*; husband also claimed he was paying $35 a week for child's support notwithstanding lack of visitation rights. [*Justice Backer later held this indicated a general appearance; see (20) below.*

New Jersey Superior Court

(3) Sept. 20, 1962: Wife moved to dismiss action on grounds of (a) full faith and credit clause of U.S. Constitution, (b) res judicata, and (c) physical presence of child in New York, where jurisdiction over child had already attached and where wife was providing support.

(4) Sept. 20, 1962: Wife obtained order directing husband to show cause why complaint should not be dismissed in accord with motion to that effect or, alternatively, why husband should not be restrained from proceeding in New Jersey until New York actions had been determined. *Interim restraint was issued, restraining husband from proceeding further in New Jersey, including*

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proceeding on show cause order of Aug. 27 (see (2) above). Husband granted leave to move to dissolve or modify restraints here imposed on 2 days' notice to wife.

This order was obtained in disregard of New York restraining order of Sept. 5, 1962 (see (9) above) and without regard to the 2-day notice required to dissolve or modify the New Jersey restraining order of Sept. 20, 1962.

(5) Sept. 21, 1962: Without notice to wife and without moving to dissolve or modify Sept. 20 restraining order (see (4) above), husband obtained ex parte restraining order forbidding wife from proceeding in any manner in the New York proceedings, including any applications or orders to show cause or enforcement of sequestration orders in New York. *The wife was later found to have violated this order, for which she was held in contempt of court (see (15) and (16) below).*

(12) Sept. 25, 1962: Justice Klein signed order, based on his Sept. 17 decision, denying husband's motion to dismiss for lack of jurisdiction and to reargue three motions, finding that the husband's supporting grounds on reargument were "clearly insufficient" to warrant any deviation. *On Oct. 4, 1962, the husband's attorney filed a notice of appeal to the Appellate Division from this Sept. 25 order, but the appeal was never perfected.*

(13) Oct. 1 and 8, 1962: New York receiver moved to find husband's trustee in contempt for failure to turn over trust profits and cash income. Husband intervened through counsel, asked to be served with papers, and argued

merits of this contempt motion on Oct. 16, and later moved to vacate order of sequestration. [*Justice Backer later held these actions to constitute a general appearance; see (20) below.*]

(14) Oct. 23, 1962: Husband submitted Sept. 21 New Jersey order restraining wife from proceeding in New York.

(15) Nov. 7, 1962: Justice Chimera denied "effectiveness" of New Jersey restraint and refused to enjoin wife from proceeding further in New York. He also denied husband's motion to vacate order of sequestration on jurisdictional grounds, finding that the "issue presented is res judicata (see order, Klein, J., September 12, 1962), and the motion is accordingly denied." Husband's trustee ordered to pay money to receiver to pay medical bills of child.

(16) Dec. 12, 1962: Justice Klein issued temporary order granting wife's motion for *pendente lite* alimony and counsel fees, and awarding temporary custody of child to wife. Alimony established at $275 per week for support of wife and child during pendency of action; husband granted reasonable visitation rights on Sundays in New York City from 9 a.m. to 5 p.m. New York receiver ordered to pay taxes and mortgage installments on New Jersey property. This order was premised in part on affidavits and counter-order submitted by

New York Supreme Court

husband and recited that the husband had vacated his special appearance. See Appendix E hereto, p. E-2, *infra*.

(17) Dec. 24, 1962: Justice Klein denied effectiveness of all New Jersey restraining orders and signed final order for *pendente lite* alimony, counsel fees and support in accordance with his ruling of Dec. 12 (see (16) above).

(18) Dec. 24, 1962: Wife filed motion for order declaring that husband had made a general appearance in New York proceedings and was subject to *in personam* jurisdiction of New York court. Due notice of hearing on motion given husband.

New Jersey Superior Court

(6) Dec. 19, 1962: Husband obtained ex parte order restraining wife from entering any order of support in New York. This order was submitted to Justice Klein of the New York Supreme Court. This order also granted the husband visitation rights from 7 p.m. Friday to 7 p.m. Sunday, contrary to the prior visitation order of New York Supreme Court of Dec. 12, 1962. *Wife never served with this order, but she was later found in contempt for violating the visitation provisions (see (15) and (16) below).*

(7) Jan. 4, 1963: Husband obtained ex parte order restraining wife from obtaining order of New York court as to husband's general appearance in that court. *Wife was not served with this*

New York Supreme Court	New Jersey Superior Court
	order, but was later found in contempt for violating it (see (15) and (16) below).
(19) Jan. 8, 1963: Hearing before Justice Backer on motion for order respecting husband's general appearance. Husband submitted only the New Jersey restraining order of Jan. 4, 1963.	
(20) Jan. 11, 1963: Justice Backer issued order, based on a review of "the entire file and papers therein," declaring that the husband (a) "by his participation in the case as set forth more fully herein has appeared generally herein," and (b) "has submitted himself generally to the jurisdiction of this Court, conferring in personam jurisdiction over his person in the within action." This order recited, *inter alia*, the New Jersey court injunction of Jan. 4, 1963, restraining the wife from obtaining this order, and denied any efficacy thereto. See Appendix F hereto, p. F-1, *infra*.	
	(8) March 11, 1963: Hearing on wife's motion to dismiss; wife submitted New York court orders and argued they were entitled to full faith and credit under U.S. Constitution.
(21) Aug. 12, 1963: Husband was served with notice of trial, on motion of New York receiver. Court moved the case to trial despite the husband's submission of the New Jersey restraints.	

New York Supreme Court	New Jersey Superior Court
	(9) Aug. 19, 1963: Wife filed motion to strike all restraints, based on full faith and credit due New York court orders.
	(10) Oct. 4, 1963: Husband commenced action for absolute divorce on ground of extreme cruelty, alleging New Jersey domicile and same marital facts involved in New York proceeding. Wife was served in New York on Jan. 3, 1964.
(22) Nov. 4, 1963: Trial of separation action before Justice Aurelio. Husband failed to appear but forwarded copies of New Jersey restraints; he also addressed a letter to the Justice, arguing jurisdiction, alimony, amount of his income, and acts of the wife. Wife granted decree of separation, plus judgment for back alimony, custody of child, $500 weekly support for herself and child, and all furniture and furnishings of the parties. Court also found that that husband had made a general appearance, that parties since marriage had been New York domiciliaries, and that the child since birth had been a New York domiciliary. Husband was duly and personally served with findings, conclusions and proposed order incorporating all the above. See Appendix G hereto, p. G-1, *infra.*	
(23) Dec. 2, 1963: Justice Aurelio signed final judgment of separation, which was duly served on husband. Judgment recited that husband, having been duly served	

New York Supreme Court

personally in New Jersey and having appeared generally in the proceeding, was subject to the New York court's *in personam* jurisdiction. The accompanying conclusions of law declared that (a) both parties were residents and domiciliaries of New York from the date of marriage to the present, (b) the matrimonial res at all times since marriage had been in New York, (c) the child has been and is a New York domiciliary, and (d) the husband "has appeared generally in this action by his attorney . . . . and that this Court has in personam jurisdiction over his person." See Appendix G hereto, p. G-5, *infra*.

New Jersey Superior Court

(11) Dec. 19, 1963: Wife moved to dismiss original New Jersey action on ground of final New York separation decree, asking that it be given full faith and credit.

(12) Aug. 11, 1964: Wife ordered to show cause why she should not be adjudged guilty of contempt of court for violation of New Jersey decrees.

(13) Aug. 24, 1964: Judge Concilio rendered opinion and order (a) denying all motions made by wife, (b) holding the husband to be a New Jersey domiciliary, (c) finding jurisdiction in New Jersey to decide custody by virtue of N.J.S.A. 9:2-2 and 9:2-3, providing for jurisdiction on complaint of either parent when living separately from the other, (d) acknowledging that the husband had appeared specially in New York to

contest jurisdiction over his person and subject matter of the action and referring to and quoting from various rulings of Justices Klein and Backer of the New York Supreme Court, and (e) denying full faith and credit to the New York court decrees since the husband "was never served with process in New York, never appeared generally, nor did he actively participate or argue the merits of that action." See p. B-23, *infra*.

The latter determination was based on Judge Concilio's own review of the New York papers before each Justice sitting on each motion and on Judge Concilio's view of the New York law, derived from testimony of New York lawyers concerning that law. All of these papers and orders had previously been before Justice Backer of the New York Supreme Court in his Jan. 11, 1963, determination as to the husband's general appearance in New York.

Judge Concilio referred the alleged contempt of the wife to other judges for determination. See Appendix B hereto, p. B-1, *infra*.

(14) Oct. 2, 1964: Hearing held on contempt citation, including claim by husband that he was not allowed to see child during hours specified in New Jersey court order. Wife interposed exemplified copies of New York interim and final orders as to Sunday visitation only, plus order forbidding removal of child from New York.

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(15) Oct. 20, 1964: Judge Duffy entered order finding wife guilty of civil contempt in that she proceeded with her New York action despite New Jersey court orders restraining her from doing so and that she violated New Jersey visitation order. She was ordered jailed and fined unless and until she vacated all New York orders and judgments obtained on and after Sept. 21, 1962. *As part of the contempt punishment, the custody of the child was "hereby awarded" to the husband pendente lite.* See Appendix C hereto, p. C-3, *infra.*

(16) Nov. 12, 1964: Further contempt order entered by Judge Nimmo, finding wife guilty of civil contempt, fining her $3000, ordering her to vacate all New York orders and judgments obtained on and after Sept. 21, 1962, and ordering imprisonment unless and until she complies. See Appendix C hereto, p. C-3, *infra.*

(17) March 17, 1966: Appellate Division of Superior Court of New Jersey affirmed orders adjudging wife to be in contempt. Appellate Division opinion stated it could find "nothing in the record to establish that at the time the Chancery Division action [in New Jersey] was commenced the New York court had personal jurisdiction over the . . . [husband] or the marital *res*." See Appendix A hereto, p. A-2, *infra.* This decision was affirmed per curiam, for the reasons expressed by the Ap-

pellate Division, by the New Jersey Supreme Court on Oct. 9, 1967. See Appendix A hereto, p. A-2, *infra*.

(18) Sept. 26, 1966: Husband obtained uncontested divorce decree; decree nisi entered. Wife was unable to attend or contest in person because of threat of arrest under contempt orders.

(19) 1962 to present: Sporadic hearings held from time to time on husband's custody claim; wife unable to attend most sessions due to arrest threat under contempt orders. Issue still unresolved, although wife has made claim that New York determination of custody is entitled to full faith and credit. During all of this period, husband has made sporadic payments of $35 a week for support of child.

RAISING THE FEDERAL QUESTIONS

The petitioner at each and every stage of the proceedings below in the New Jersey courts raised the federal constitutional issues relative to full faith and credit and due process of law, as indicated in the foregoing chronology.

Indeed, the critical opinion of Judge Concilio of the New Jersey Superior Court (see p. B-11, *infra*) contains an elaborate consideration of the full faith and credit issue, indicating that this federal issue was properly and timely raised by the petitioner at the earliest opportunity. While the appellate decisions are not as precise in their discussions of this federal issue, the question was properly raised by petitioner and the affirmance of the contempt findings necessarily involved a resolution of the federal question.

REASONS FOR GRANTING THE WRIT

This case involves an irreconcilable and massive conflict between two state judicial systems, a conflict that the Full Faith and Credit Clause of the United States Constitution was designed to preclude. Caught squarely in the middle of the battleground are two individuals—an innocent minor child whose custodial status is being torn asunder and the petitioner wife who has been fined and threatened with imprisonment for her understandable reliance on the Full Faith and Credit Clause. And despite all the great expenditures of energy and time by the judges of both New York and New Jersey, to say nothing of the legal expenses incurred by the parties, the battle has reached a complete stalemate. Only this Court can now resolve this interstate judicial deadlock.

Seldom has a full faith and credit case come to this Court so entwined with considerations of child welfare and personal liberty. Seldom has a state judiciary so consistently and openly flouted the duly adjudicated rulings of the courts of another state. Seldom has there been such a flagrant contradiction of the constitutional concepts of full faith and credit, concepts long recognized by this Court.

This constitutional problem is to be found at the very heart of the contempt orders in question. The validity of those orders necessarily depends upon the validity of the the New Jersey court's studied refusal to respect the careful adjudications of the New York Supreme Court that the respondent husband had subjected himself to the *in personam* jurisdiction of the New York courts through his special and his general appearances. Had those New York adjudications been accepted and been given the credit that the Constitution requires, the New Jersey decrees as to which the petitioner wife has been found in contempt would have no jurisdictional base.

Hence the problem under the Full Faith and Credit Clause is inescapably present. And the nature of the resolution of that problem by the New Jersey is such that review by this

Court is essential if the established constitutional concepts are to remain inviolate.[1]

1. The decision below directly conflicts with the relevant decisions of this Court respecting application of the Full Faith and Credit Clause.

Less than five years ago this Court in *Durfee v. Duke*, 375 U.S. 106, 111, restated the guiding principles of the Full Faith and Credit Clause in these terms:

> "However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

And the *Durfee* opinion once again made it clear that the *res judicata* principles underlying the Full Faith and Credit Clause are fully applicable to jurisdictional determinations of a state court. This Court in *Durfee*, 375 U.S. at 113, quoted with approval the classic statement in *American Surety Co. v. Baldwin*, 287 U.S. 156, 166, that "The prin-

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[1] Petitioner, in a companion petition filed this day, also seeks review of a federal court ruling in a diversity case that petitioner's suit to recover two money judgments obtained in New York courts against her husband should be stayed pending the New Jersey ruling in the instant case on the full faith and credit issue. *Joffe v. Joffe*, 384 F.2d 632 (C.A. 3). The Third Circuit there acknowledged that the New Jersey Supreme Court "has now affirmed the Superior Court decision denying full faith and credit to the New York proceedings here involved." 384 F.2d at 633.

ciples of *res judicata* apply to questions of jurisdiction as well as to other issues."

The decision below, viewed from the standpoint either of the husband's conceded special appearances or of his general appearances as found by the New York court, is in flat conflict with the principles recognized and restated in *Durfee*.

A. *The husband's special appearances*

It is undisputed that the respondent husband made repeated special appearances in the New York Supreme Court to challenge its jurisdiction over his person and the subject matter of the wife's action. Judge Concilio of the New Jersey Superior Court so found: "This Court therefore finds that the plaintiff herein [the husband] did enter a special appearance to contest the jurisdiction of the New York court." See p. B-16, *infra*.

Such being true, it became irrelevant whether the husband also made a general appearance or otherwise submitted himself to the *in personam* jurisdiction of the New York court. The critical fact is that he made a special appearance challenging the jurisdiction of the New York court; by his August 14, 1962, motion to vacate and set aside the summons and complaint "on the ground that this Court does not have jurisdiction of the subject matter of this action and that defendant is a person not subject to the jurisdiction of this this Court," the husband invoked the jurisdiction of the New York court to decide its own jurisdiction. Full and fair hearings ensued on these jurisdictional matters. And the resulting and repeated rulings of the New York court to the effect that it had both subject matter and personal jurisdiction over the husband became entitled to full faith and credit under the principles recognized in *Durfee*.

Indeed, the abject refusal of the New Jersey courts to give full faith and credit to the New York rulings emanating from the special appearance is directly contrary to this Court's decision in *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522. This Court there held that one fed-

eral court must give *res judicata* effect to the jurisdictional ruling of another federal court stemming from a special appearance challenging the jurisdiction of the latter court. The Court said (283 U.S. at 524-526):

> "It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. . . . The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over the person. It had the election not to appear at all . . . It also had the right to appeal from the decision of the Missouri district court . . . It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.
>
> "Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

Since the Court could find no reason why this *res judicata* doctrine, which is also the essence of the Full Faith and Credit Clause, "should not apply in every case where one voluntarily appears" specially, the decision below must be classed as a rejection of the *Baldwin* rationale. As such, the decision below demands review and correction.

B. *The husband's general appearance*

The New Jersey court's rejection of the efficacy of the New York rulings was expressly premised on its own determination that the husband "was never served with process in New York, never appeared generally, nor did he actively participate or argue the merits of that action." See p. B-23,

infra. In light of the acknowledged special appearances of the husband in New York, such a premise is quite inadequate to support a refusal to give full faith and credit to the New York decrees. Whether or not the husband made a general appearance or participated actively or was served in New York, he did challenge jurisdiction through his special appearance, resulting in jurisdictional rulings entitled to full faith and credit.

But even accepting this premise of the New Jersey court as one relevant to the application of the Full Faith and Credit Clause, the decision below is in complete conflict with the principles emunciated in *Durfee* and *Baldwin* and related cases. Here the New Jersey courts openly and frankly declined to respect the earlier New York determinations that the husband had subjected himself generally to the *in personam* jurisdiction of the New York courts – determinations rendered after full and fair litigation of that jurisdictional issue. That refusal, moreover, was grounded not on any notion or finding that the litigation as to the husband's general appearance in New York was less than full or fair but rather on the New Jersey court's own evaluation of the record and its disagreement with the New York court's repeated conclusion that the husband had in fact submitted himself to *in personam* jurisdiction in New York. In effect, the New Jersey court sat as an appellate court in review of the New York Supreme Court's findings, thereby creating havoc with procedural and appellate due process and with the orderly administration of interstate justice.

The New Jersey courts, in other words, simply reexamined and relitigated the New York proceeding and arrived at their own conclusion that there were no facts to support the New York court's determination that the husband had made a general appearance in New York. Thus Judge Concilio of the New Jersey Superior Court, "with the help of the voluminous file" that was before Justice Backer of the New York Supreme Court, "examined the matters listed in the . . . order" of Justice Backer that led the latter to conclude

that the husband had made a general appearance; based on that independent examination, Judge Concilio "finds that there is nothing in said file, nor that plaintiff herein [the husband], either himself or by his New York attorney, which would indicate that he entered a general appearance by participating in the case actively and arguing it on the merit." See p. B-19, *infra*. It was for that reason alone that Judge Concilio declined to give full faith and credit to any of the New York proceedings. See p. B-19, *infra*.

Similarly, the Appellate Division below could find "nothing in the record to establish that at the time the Chancery Division action [in New Jersey] was commenced the New York court had personal jurisdiction over the . . . [husband] or the marital *res*." In adopting that rationale, the New Jersey Supreme Court added its approval to the *de novo* New Jersey inquiry into the New York jurisdictional file.

But under the principles enunciated in the *Durfee* and *Baldwin* decisions, it was not the function of any New Jersey judge to reexamine the New York file. His constitutionally limited inquiry was at an end once it became evident that the New York jurisdictional ruling was rendered after the matter was put fully and fairly into litigation. And such full full and fair litigation respecting the jurisdictional issue is readily apparent from the record. The determinations of Justice Backer and Justice Klein of the New York Supreme Court on these jurisdictional matters were all rendered after appropriate motions had been made by the wife and served on the husband and after hearings were held at which the husband submitted whatever he felt relevant.[2] In New York, such determinations were entitled to be treated as *res judi-*

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[2]The fact that the husband saw fit, for the most part, to submit at these hearings on the jurisdictional question only copies of the New Jersey restraining orders does not detract from the full opportunity he was given to submit other material.

Moreover, the husband did file a notice of appeal from Justice Klein's ruling of September 25, 1962, overruling the husband's renewed

cata, as Justice Chimera ruled on November 7, 1962. In the words of this Court in *Durfee v. Duke*, 375 U.S. at 109, "Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it."

It thus becomes clear that the decision below is at war with the established doctrines of this Court under the Full Faith and Credit Clause. It has been said time and again that "One trial of an issue is enough," *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78, and that there is, constitutionally speaking, "no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction . . ." *Stoll v. Gottlieb*, 305 U.S. 165, 172. The Full Faith and Credit Clause, in short, does not permit the New Jersey courts to reexamine or to review the once-litigated issue as to New York's *in personam* jurisdiction – even though New York's decision in the matter might be considered erroneous. *Ibid.*

Moreover, this Court's decision in *Davis v. Davis*, 305 U.S. 32, sets to rest any suggestion that the peculiar nature of the husband's plea in the New York courts – that he appeared there specially rather than generally – somehow permits a reexamination and relitigation of whether he also made a general appearance in New York. The Court there ruled that the courts of the District of Columbia had to give full faith and credit to a divorce decree rendered in Virginia,

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challenges to jurisdiction. But the husband never perfected that appeal, thus binding him to Justice Klein's determination.

As was said in *Sherrer v. Sherrer*, 334 U.S. 343, 352, "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant in such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the State in which it was rendered."

despite the wife's claim that the Virginia court lacked jurisdiction because the plaintiff husband in the Virginia case had not been domiciled in that state. The wife's assertion that the domicile issue had not been litigated in Virginia because her plea there "was special and made for the sole purpose of challenging jurisdiction" was found to be of no consequence (305 U.S. at 42):

> "If the plea alone may not be held to amount to a general appearance, there arises the question whether, by her participation in the litigation and acquiescence in the orders of the court relating to merits, she submitted herself to its jurisdiction for all purposes. Her plea and conduct are to be considered together."

And after noting that the wife's plea actually attacked the husband's domicile, that the record showed that the cause came on for hearing on the merits of that assertion, that the wife did not challenge the adverse ruling on the matter, and other such actions dealing with the merits, the Court concluded (305 U.S. at 43):

> "Considered in its entirety, the record shows that she submitted herself to the jurisdiction of the Virginia court and is bound by its determination that it had jurisdiction of the subject matter and of the parties."

Hence New York courts here had the right to consider whether, under New York law,[3] the husband's participation in the New York proceeding amounted to a general appear-

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[3] Under New York law in effect at the time of the events in question it was plain that a party who raised a point of law in objection to the complaint or who argued any point on the merits in an affidavit or otherwise would be considered to have made a general appearance, despite his characterization of the appearance as "special." *Ratkowsky v. Ratkowsky*, 272 App. Div. 775, 69 N.Y.S.2d 573; *Caines v. Prudential Ins. Co.*, 168 N.Y.S.2d 813; *Matthews v. Matthews*, 14 App. Div. 2d 546, 217 N.Y.S.2d 736. New York has subsequently abandoned all distinctions between special and general appearances.

ance. Once that determination was made after due notice and hearing, the New York rulings became entitled to full faith and credit.[4] New Jersey courts could not thereafter reexamine the nature of the husband's participation in the New York case and render a conclusion contrary to the New York result.

The decision below thus conflicts squarely with *Davis v. Davis, supra.*

2. The decision below raises important questions that should be decided by this Court.

It is important, of course, that any overt deviation from established constitutional principles be reviewed and corrected by this Court. But it is particularly important in the widely litigious area of domestic relations law that it be authoritatively determined once again that the Full Faith and Credit Clause means what it says and strictly limits the scope of judicial inquiry into jurisdictional matters already adjudicated in another state.

The New Jersey decision here in question may represent a growing parochial attitude of some state courts to protect their own domiciliaries at the expense of the litigated rights of non-residents. By the technique of simply reexamining, reviewing and reevaluating the file of proceedings in the court of another state, the New Jersey courts have achieved precisely that parochial result – and without support from any decision of this Court. Without review by this Court, the technique employed below can conceivably spread to other state courts; certainly in New Jersey, the technique is now an established doctrine.

Moreover, importance attaches to the decision below by virtue of the contempt of court context in which it comes

[4]There is no suggestion here that the New York ruling was in any way infected with fraud. On the contrary, the result was amply justified by the repeated arguments and claims of the husband relating to the merits of the sequestration, alimony and custody matters in issue.

to this Court. The petitioner wife in good faith relied upon the Full Faith and Credit Clause to rebut the stream of restraining orders issuing from the New Jersey court, orders that were flatly inconsistent with orders being issued by the New York court. And she was sustained in her position by the consistent refusal of the New York court to permit those restraining orders to hinder its actions or to hinder her right to proceed in New York – thereby adjudicating the legality of the New Jersey restraints.

Petitioner was thus placed in an impossible position between two conflicting sets of judicial actions. In that circumstance, does the Due Process Clause of the Fourteenth Amendment permit a state court to impose fines and imprisonment sanctions on one who in good faith followed one set of judicial actions rather than another? Is it consistent with due process to punish her for disobedience of court orders that, by virtue of the Full Faith and Credit Clause, New Jersey should never have issued?

If it be assumed that New Jersey was bound to respect the results of the New York litigation, may a litigant be punished for disobedience of the New Jersey orders that lacked any jurisdictional basis? Indeed, given that assumption, would New Jersey itself have permitted this contempt citation or this contempt punishment? *Cf. Donovan v. City of Dallas*, 377 U.S. 408, 414.[5]

These, then, are the important questions arising out of the ruling below, questions that deserve and need the fullest

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[5] In the *Donovan* case it was argued that a Texas state court finding of civil contempt should be upheld, despite this Court's ruling that the underlying court order was invalid, since there was a duty to obey a restraining order whether that order was valid or invalid. This Court, noting that the petitioners would be punished for disobeying an invalid order, remanded the matter to the state court since the Court did not know whether "the Texas court would have punished petitioners for contempt had it known that the restraining order petitioners violated was invalid." 377 U.S. at 414.

consideration by this Court. This is not a narrow case, limited in scope to the particular husband and wife now before this Court. Like all cases raising major constitutional considerations, its repercussions upon future litigation of a like nature are incalculable but nonetheless substantial. As such, the decision below deserves review.

3. The decision below transferring the custody of a minor child as punishment for a mother's alleged contempt of court raises a serious constitutional question.

A most disturbing aspect of the decision below is the approval necessarily given to that portion of the contempt order of Judge Duffy directing that "custody of the infant child of the marriage, Philip Lewis Joffe, be and the same is hereby awarded to the . . . [husband] pendente lite." See p. C-3, *infra*. This direction, whereby the wife lost custody of the child, was obviously part of the punishment being inflicted upon her for her contempt of the court's restraining orders.

At all times prior to this contempt order, the child had been in the wife's custody in New York pursuant to appropriate custody orders entered by the New York court. While notice was given the wife in the order to show cause respecting the alleged contempt that the custody of the child was thereby being put in issue, no testimony or evidence was introduced at the contempt hearing in any way bearing on the custodial welfare of the child. The custody order was sheer retribution, a penalty inflicted on the wife for her contempt.

A more flagrant violation of the rights and interests of the infant and of the wife under the Due Process Clause of the Fourteenth Amendment would be difficult to imagine. The child was made the pawn of the marital dispute between the husband and wife. His custody, moreover, was converted from a matter of his welfare into a weapon of punishment for the wife's contempt of court.

This gross perversion of a state court's contempt powers and the unwarranted intrusion upon the relationship between mother and son are too obvious to require elaboration. Mr. Justice Cardozo, while sitting on the New York Court of Appeals, once wrote that "The residence of a child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor the definition of parental rights dependent upon status. . . . Parents so situated must settle their controversies at home." *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624, 625. And so here, the residence and the custody of this child should not be used as a pretense for adjudicating a marital dispute between husband and wife. Nor should such residence and custody be used as a sanction or penalty for contempt of court.

So treacherous a violation of basic due process and of basic human values fully merits the attention and consideration of this Court. Can the Due Process Clause of the Fourteenth Amendment be satisfied when a child's custody and welfare are made arsenals in the execution of a state court's punitive contempt powers?

CONCLUSION

For these various reasons, the writ of certiorari should issue and the judgment below should be reviewed.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

March 1, 1968

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-15 September Term, 1967

SIDNEY H. JOFFE,
Plaintiff-Respondent,

v.

GUSSIE JOFFE,
Defendant-Appellant.

Argued September 25, 1967. Decided October 9, 1967.

On appeal from a judgment of the Superior Court, Appellate Division, where the following per curiam opinion was filed:

"This is an appeal by defendant Gussie Joffe from orders entered in the Superior Court, Chancery Division, on October 20 and November 12, 1964 adjudging her in contempt for (1) violation of an order entered September 21, 1962, restraining her from proceeding in a separation suit instituted by her in the Supreme Court of New York; (2) violation of similar orders entered subsequent thereto, and (3) violation of an order entered December 19, 1962 granting plaintiff the right of visitation with the infant child of the marriage.

"Defendant contends that the orders adjudging her in contempt are void because the Chancery Division is bound by an order of the Supreme Court of New York holding that plaintiff Sidney H. Joffe submitted to its jurisdiction *in personam*. She further contends that the Chancery Division has no jurisdiction over the custody of the infant child of the marriage.

"There is no question concerning the jurisdiction of our courts over the person of defendant. She was personally served in New Jersey with the summons and complaint in

the action filed by plaintiff on August 17, 1962 seeking, *inter alia,* custody of or visitation rights with the infant child of the marriage. The record clearly indicates that the domicile of plaintiff was at all times in New Jersey—that the marital *res* and matrimonial domicile is here. Furthermore, the child's domicile is also in New Jersey.

"There is nothing in the record to establish that at the time the Chancery Division action was commenced the New York court had personal jurisdiction over the plaintiff or the marital *res.* It is further apparent that all New York judgments were obtained by defendant in violation of the Chancery Division restraining orders.

"By proceeding in the New York court after having been served with the restraining orders of our court, defendant was guilty of contempt. The judgment of the Chancery Division adjudging defendant in contempt of court is affirmed."

Mr. Thomas W. Dunn argued the cause for the appellant (*Mr. Walter H. Jones,* attorney.)

Mr. J. Mortimer Rubenstein argued the cause for the respondent.

PER CURIAM:

The judgment is affirmed for the reasons expressed in the opinion of the Appellate Division, *supra.*

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
Chancery Division, Passaic County

SIDNEY H. JOFFE,
Plaintiff

v.

GUSSIE JOFFE,
Defendant.

Nos. M6660-61
and M32-62

OPINION OF JUDGE CONCILIO
Filed August 24, 1964

THE COURT: This matter is before this court on a petition and order to show cause to dismiss the complaint filed by the plaintiff in this cause or to enjoin or restrain him from proceeding in the same on the grounds: (a) that this court has no jurisdiction: (b) there is presently pending in a court of competent jurisdiction the issues to be determined in this cause: (c) that the jurisdiction of the infant child under the doctrine of parens patriae is in the court of the State of New York and (d) that the rule of comity and full faith and credit prevents this court from asserting jurisdiction, if any, from proceeding with the cause herein. This petition was filed on September 19, 1962. The order to show cause was returnable on October 5, 1962. Said order also restrained plaintiff from proceeding with his action.

The plaintiff, Sidney H. Joffe, filed a complaint in the Superior Court of New Jersey, Chancery Division, Passaic County, Docket Number M-32-62, on August 17, 1962, seeking custody of the infant child born of the marriage between the plaintiff and defendant, or in the alternative rights of visitation and also the return of certain personal property belonging to the plaintiff, alleged to have been taken by the defendant from the premises known as 155 Wildwood Avenue, Montclair, New Jersey.

It further appears that defendant, a New York Attorney, instituted an action against the plaintiff herein, in the Supreme Court of New York, New York County, in June 1962, for separate maintenance and support and custody of the infant child and miscellaneous relief concerning property, both personal and real, situate in New Jersey.

It is admitted and stipulated that Sidney H. Joffe was never served personally in the State of New York in the action instituted there by his wife, Gussie Joffe.

The record discloses that Gussie Joffe was served personally in New Jersey with the summons and complaint in the action commenced by her husband in the New Jersey Superior Court above referred to, on August 23, 1962, by someone in the Passaic County Sheriff's Office.

The Court, after reading the petition and the affidavits of both the plaintiff and defendant, came to the conclusion that it should hear oral testimony on the questions raised thereby as the affidavits were in such conflict, it did not know who was telling the truth. R.R. 4:44-4.

It is to be noted that the temporary restraining order signed by this court on September 21, 1962, enjoined and restrained the defendant herein, Gussie Joffe, her agents, servants and attorneys, from proceeding in any manner whatsoever in the action instituted by her against her husband, Sidney H. Joffe, in the Supreme Court of the State of New York, County of New York, Special Term, Part No. 12, Index 30789, 1962, and upon any application or order to show cause entered or pending in said matter, including but not limited to order to Show Cause which issued in said matter, to restrain the plaintiff herein, Sidney H. Joffe, from proceeding with his cause of action in this court, and further including but not limited to any action to enforce in any manner the Writ of Sequestration heretofore issued out of the Supreme Court of the State of New York * * * until the 5th day of October, 1962 and until the further order of this Court.

By virtue of this order and the order previously mentioned obtained by the defendant herein, the plaintiff is restrained from proceeding with the New Jersey action and the defendant herein is restrained from proceeding with the New York action.

Neither of these orders has been dismissed nor discontinued.

On the return day of these orders the matter was adjourned. From time to time thereafter orders of continuance were entered as were the hearings on the several petitions to hold the defendant herein in contempt.

The hearing upon defendant's petition was set down for hearing on March 11, 1963. At that hearing the defendant offered in evidence, certified and exemplified copies of certain proceedings and orders in the New York matter and contended that the matter between the parties in New Jersey was res judicata and that plaintiff's action in this state should be dismissed. The defendant, Gussie Joffe, did not take the stand. The court took no action on this motion as it felt it was not foreclosed from inquiring into the binding effect of the orders entered by the New York Court on this court and that it wanted to take testimony whether the plaintiff herein had entered a special or general appearance in the New York action. This court also wanted to take testimony as to the domicile of both the plaintiff and defendant.

The attorneys for both parties had New York attorneys testify on November 15, 1963. This court wishes to say in passing that it was not impressed by the manner in which this was handled by either party and further by the testimony of said attorneys and particularly the attorney called by the defendant herein.

A motion by the defendant to vacate an order dated August 14, 1963, was returnable on September 20, 1963. This motion was also continued. The defendant filed a supplemental notice of motion to take oral testimony of the plain-

tiff, which was returnable on October 4, 1963. This motion was also continued.

On December 19, 1963 plaintiff presented evidence as to his domicile. It is to be noted that defendant did not examine plaintiff relative to the two motions mentioned above.

At this hearing the court requested the defendant herein to furnish it with certified copies of all the pleadings, moving papers, returns of service, transcripts of testimony, determinations and orders filed and entered in the New York proceedings between the parties, excepting, however, those previously produced and entered in evidence in this matter. These were to have been forwarded to this court prior to the Christmas recess. The court wants it to be noted on the record that to date, this request has not been complied with. Pursuant to a letter of this court addressed to the defendant's attorney, dated February 17, 1964, it was requested that these papers be submitted to the court by March 5, 1964. During the week of March 9, 1964, the defendant's attorney called at my chambers in Newton, New Jersey and delivered to me a file purported to be that of the defendant in this matter and that of the plaintiff in the New York action. Although this was not proper evidence, the court felt it might be useful to peruse and assist it in arriving at its determination in this matter.

This court regrets that it had to delay rendering its decision on the motions until the summer recess.

I

This court shall decide the original motion made by the defendant first.

A

The preliminary determination for this court to make is whether the plaintiff was domiciled in New Jersey prior to and at time of the commencement of this action.

From the age of 4 years until he graduated from medical school the plaintiff resided in Haledon, New Jersey and was

registered and voted there. He then moved to Paterson, New Jersey and resided there until 1937 when he moved to Glen Rock, New Jersey, where he remained until 1959 when he moved to Montclair, New Jersey, where he lived until he moved back to Paterson, New Jersey in May 1962, where he has resided ever since. He is a licensed physician of the State of New Jersey. He began his practice in Paterson, New Jersey in 1935. He has never been licensed to practice medicine in any other state. He was married to Gussie Joffe at Glen Rock, New Jersey on January 15, 1955 by Nathan Bernstein, a Magistrate. At the time of said ceremony, the plaintiff was residing at 155 Rock Road, Glen Rock, New Jersey in a one-family home owned by him. At that time, he maintained an office for the practice of medicine at 556 East 28th Street, Paterson, New Jersey, together with his twin brother, Philip Joffe, which office and which practice he still maintains and has maintained continuously during the period of this marriage. At that time, he was on the staff of the Barnert Memorial Hospital of Paterson, New Jersey and is still on said staff. At the time of the marriage the defendant, who was and still is an Attorney at Law of the State of New York, was domiciled in and resided in the State of New York and maintained an apartment in the State of New York.

After the marriage, she came to live with the plaintiff and their home was located at 155 Rock Road, Glen Rock, N. J.

They continued to live at 155 Rock Road, Glen Rock, New Jersey until November 1959. Since 1945, while living at that address the plaintiff was affiliated with Temple Emanuel, a conservative temple of the Hebrew Faith, at Paterson, N. J. When he moved to Montclair, New Jersey, he became a member of the Temple Shomrei Emunah, at Montclair, being a Hebrew Temple. The defendant was also registered as a member at this temple and was affiliated with its sisterhood.

On March 22, 1955, an agreement was entered into between the plaintiff and defendant to execute joint wills,

both declared therein and in their wills that they were of the Borough of Glen Rock, Bergen County, New Jersey. It is also interesting to note that in the deed to the Montclair property, it is recited that they are of the Town of Montclair, Essex County, New Jersey. In May, 1962, the defendant in applying for a renewal of her passenger car license indicated she resided at 759 11th Avenue, Paterson, New Jersey. She also had a New Jersey driver's license.

The parties entertained their guests at their homes in New Jersey. The plaintiff's automobiles and his driver's license were registered in and issued by the State of New Jersey. He never had any issued by any other state. He further testified that he has always been a registered voter of the State of New Jersey and has never been registered in, nor voted in any other state.

There was some testimony relative to an apartment used by the defendant in New York. Plaintiff never paid for the rent, nor did he ever live there with the defendant. The plaintiff wanted the defendant to forego this but defendant countered that she could deduct the expense of the same from her income tax return as a business expense.

A child, Philip Lewis Joffe, was born of this marriage on July 23, 1958 at the Barnet Memorial Hospital, Paterson, New Jersey. After birth, the child lived with its parents at either the Glen Rock or Montclair address, until sometime in May 1962, when defendant took the child to New York with her.

The burden of establishing the fact of domicile is upon the party who relies on it. Lea v. Lea, 18 N.J. 1 (1955). A domicile of choice has been said to be essentially a question of residence and intentions. Collins v. Yancey, 55 N.J. Super. 514 (Super L.D. 1959). It is generally recognized that the two requisites without which no domicle of choice could be established are (1) physical presence, and (2) the concomitant unqualified intention to remain permanently and indefinitely. Gosschalk v. Gosschalk, 48 N.J. Super. 566 (Super A.D. 1958), Aff. 28 N.J. 73 (1958).

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> a New Jersey resident parent is his most suitable custodian. See Matflerd v. Matflerd 10 N.J. Super. 132 (App. Div. 1950)."

This court concludes on this issue that from the testimony it has heard that this court has jurisdiction to hear this matter.

III

A

The next inquiry is whether this court can assert jurisdiction in this matter as a court in New York has before it an action commenced prior to this action wherein the parties herein are reversed and which action also has for its determination the question of custody.

It is important therefore to examine the proceedings in the New York Court from its inception to the time the petition by the defendant was filed in this court on September 19, 1962.

According to the defendant in this action, she instituted a suit against the plaintiff herein in the Supreme Court of the State of New York. On June 21, 1962 an order of Sequestration was signed by Supreme Court Justice Francis X. Conlon, attaching the assets of the plaintiff herein located in the State of New York. Evidently whatever assets the plaintiff herein had in New York were sequestered and a receiver was appointed.

As previously stated it has been admitted by the defendant herein and stipulated between the parties that plaintiff herein was never served personally in the State of New York with the summons and complaint in the New York action. He was served with these papers in the City of Paterson, Passaic County, New Jersey on July 2, 1962.

It next appears that, on July 12, 1962, an order to show cause was signed by Justice John L. Flynn (D-3 in Evid.) for a hearing on July 23, 1962 in said court why an order should not be made and entered in said matter:

"1. Granting temporary custody of the infant Philip Lewis Joffe, issue of the parties herein, to the plaintiff, pending the trial of the within action.

2. Granting alimony pendente lite to the plaintiff and support for the infant above in the sum of $500. per week.

3. Granting counsel fees in the sum of $5,000. to the plaintiff for the purpose of prosecuting the within action for a separation, and for such other and further relief as to this Court may seem just and proper in the premises."

The order also sets forth the manner of service and granted temporary custody of the infant child and certain restraints relating to the plaintiff and infant in the Montclair home also relative to the Montclair property.

The plaintiff herein by motion appeared specially before the New York Court "for an order vacating and setting aside the summons and complaint and order to show cause, pursuant to Section 237-a of the Civil Practice Act, on the ground that this Court does not have jurisdiction of the subject matter of this action and that defendant is a person not subject to the jurisdiction of this Court and for such other and further relief as may seem just and proper in the premises".

Section 237A of the New York Civil Practice Acts provides:

"1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the court's jurisdiction over his person. Such objection, whether based on the ground that process or its service is insufficient or that the defendant is a person not subject to the jurisdiction of the court, must be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection if raised in a manner other than that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived.

2. An objection to the court's jurisdiction over the person of the defendant shall not be waived by joining therewith a motion objection to the court's jurisdiction over the subject matter.

3. If the plaintiff on the hearing of the motion shall by affidavit deny the facts alleged by the defendant or state facts tending to obviate the objection, the court may:

(a) hear and determine the objection and where the court has no jurisdiction over any cause of action stated in the complaint, the court shall order the service set aside; however, where process and its service are sufficient to give the court jurisdiction over one or more of the causes of action stated in the complaint, the court shall order struck out of the complaint such part of it, including all or part of a prayer for relief, as is beyond the court's jurisdiction, in which case the complaint will be deemed amended accordingly, or the court may order an amended complaint to be served; or

(b) direct that the questions of fact, which shall be clearly and succinctly stated in the order, be tried by a jury or referee, the findings of fact of which shall be reported to the court for its action; or

(c) overrule the objection, and in its discretion allow the same facts to be alleged in the answer as a defense.

4. After a motion made pursuant to this section has been denied, the defendant may litigate the action on the merits without being deemed to have waived his objection to the court's jurisdiction over his person.

5. A notice of the motion made pursuant to this section, if served within twenty days after service of the complaint and made returnable within ten days thereafter, or, if there be no sitting of court within ten days, then for the first term or sitting of court thereafter at which the motion can be heard,

shall operate to stay all further proceedings in the action until the expiration of ten days after service of a copy of the order deciding the motion and a written notice of the entry thereof; provided, however, that the court may in its discretion vacate or modify the stay on motion made upon notice to the opposing party. If the motion is denied, the defendant may serve an answer, as a matter of right, before the expiration of ten days after service of a copy of the order deciding the motion and a written notice of the entry thereof."

Justice Arthur G. Klein who heard this motion rendered a decision on September 11, 1962 which is D-4 in evidence. It is repeated here in its entirety as several orders purporting to be in conformity therewith have been entered.

KLEIN, J.:

"Plaintiff has commenced an action for separation and in connection therewith now moves for alimony pendente lite and counsel fees. By separation motion (No. 6, August 27, 1962) defendant-husband appears specially and seeks to vacate and set aside service of process upon him pursuant to section 237a of the Civil Practice Act. From a reading of the voluminous affidavits submitted, although there appears to be some conflict with respect to exactly where the parties maintained their principal residence, if any, sufficient competent proof has been set forth herein to readily indicate that plaintiff satisfies the jurisdictional requirements with respect to New York residence outlined in section 1165a, subdivision 3 of the Civil Practice Act, without the necessity of conducting a formal hearing thereon before the court or a referee with the attendant delay that such a hearing might entail. The motion to vacate service of process is, accordingly, denied with leave to defendant to serve his answer or otherwise move with respect to the complaint within 10 days after service of a copy of the order to be settled herein with notice of entry thereof. Leave is also granted defendant to serve his answering affidavits in oppo-

sition to the motion for temporary alimony within the aforedescribed 10-day period. The motion to vacate service having been denied, plaintiff's motion (No. 7, August 27, 1962) for a vacatur of the stay has been rendered academic by virtue of said denial and same is, accordingly denied.

"Pending the coming in of defendant's answering affidavits, disposition of the motion in chief for alimony pendente lite and counsel fees will be held in abeyance. In the interim, the receiver of defendant's sequestered funds is directed, upon service of a copy of the order to be settled herein with notice of entry thereof, to pay all mortgage and tax payments recently due and/or about to become due on the jointly owned home of the parties, together with the payments currently due for the recent kitchen repairs. The receiver is further directed to pay out of the sequestered funds in his possession the sum of $65. per week for the support of the infant issue of the parties, inclusive of the salary of the nursemaid."

On September 25, 1962 an order was entered by Justice Klein in conformity with his decision of September 11, 1962 (D-5 in evidence). In this order it is recited that "and the defendant having appeared specially by notice of motion dated the 14th day of August, 1962, seeking to vacate and set aside the service of all process herein and to vacate the summons and complaint pursuant to section 237a of the Civil Practice Act on the ground that this court does not have jurisdiction."

Much is made by the defendant herein of a letter dated September 19, 1962, addressed to Justice Arthur G. Klein by Benjamin M. Lechenstein, an attorney at Law of the State of New York, who represented the plaintiff herein in the New York action. This letter is part of Exhibit D-6 in evidence. There was nothing in that letter nor in the decision of Justice Klein, pursuant thereto, which in the opinion of this Court would justify a finding that the plaintiff

herein was arguing the matter before Justice Klein upon its merits.

The finding by Justice Klein that he had jurisdiction in the matter before him, where no personal service had been made upon the plaintiff herein, does not foreclose this court in its relation to our social institutions in accord with the public policy of this state. Fantony v. Fantony, Supra; Lea v. Lea 18 N.J. 1, 7 (1955); Untermann v. Untermann, 19 N.J. 407, 416 (1955) and the United States Supreme Court decisions cited therein.

At this juncture, it is therefore quite apparent from Justice Klein's decision that plaintiff herein has appeared specially in accordance with the Civil Practice Act of New York. His decision tells this court that the plaintiff therein, by the voluminous affidavits filed by both parties, relative to residence, satisfied *that* Court as to the jurisdictional requirements with respect to New York residence outlined in section 1165a, subdivision 3 of the Civil Practice Act. It made no determination of the domicile or residence of Sidney H. Joffe, the plaintiff herein.

This Court therefore finds that the plaintiff herein did enter a special appearance to contest the jurisdiction of the New York Court and did nothing in his appearance before Justice Klein to make a finding that he submitted generally to the New York Court.

It is to be noted that this Court on September 21, 1962 signed an order restraining defendant herein from proceeding with her New York Action. It is quite apparent that when this Court advised both attorneys in this matter that it desired to take oral testimony pursuant to R.R. 4:44-4 and the Court probably mentioned that it had to ascertain whether the appearance of the plaintiff herein had been a general appearance as alleged by the defendant herein, that she set in motion in the New York Court proceedings which she believed would bolster her claim that the New York Court had in personam jurisdiction of the plaintiff herein.

The affidavit she filed with this court on January 30, 1963 in opposition to an order to show cause why she should not be held in contempt is most illuminating.

> "It is also important to note that when my attorney, Mr. Ratner, after a conference in chambers with opposing counsel and Justice herein, advised me to have my lawyer in New York immediately get an exemplied copy of the declaration by the New York Courts of a general appearance, I requested him to request the New Jersey Court to either lift the stay or get permission of the New Jersey Court to do so, just as Mr. Chodash, my previous attorney, had done. He told me to have my New York attorney get in touch with him.
>
> "Accordingly, I told my New York attorney what Mr. Ratner had told me and when a few days later my New York attorney asked me to sign the affidavit, I assumed and I had the right to assume that both attorneys were proceeding in accordance with my request. I know that on several occasions my attorney, while with me, attempted to contact Mr. Ratner for the purpose of obtaining such permission as Mr. Chodash had done and I had the right to assume that my lawyers were at all times acting in coordination and with respect to the Court. It is now my belief that Mr. Rothman proceeded to request a declaration from the Court inadvertently omitting to check with Mr. Ratner in the rush of the Christmas vacation. Both of my attorneys further advised me when I asked them how come I was served with a contempt order that obtaining a finalization and declaration of existing facts is not a contempt.
>
> "After receiving the order to show cause for contempt I instructed my New York attorney to desist from the motion as I felt that we had sufficient law to defeat the motion in New Jersey, but Mr. Rothman refused to abide by my decision as more fully appears by an exemplified copy of his New York affidavit being filed simultaneously herewith with

this Court, and I cannot be made responsible for his acts."

The affidavit of her New York attorney, Jesse Rothman, Exhibit D-2 in evidence, is also interesting. Starting with the second paragraph on page 2, he states:

> "Said Justice had previously advised plaintiff's New Jersey attorney, Mr. Codash, that he was interested in knowing whether there was a general appearance in New York as such an appearance would materially affect his decision. The declaration of the status of a lawsuit is not moving it to trial.
>
> "The order to show cause herein obtained by defendant's New Jersey attorney with which he hopes to stay plaintiff herein from submitting this motion on the 8th of January, 1962. PURPOSEFULLY FAILS TO ADVISE MR. JUSTICE CONCILIO (who signed it) THAT THE MOTION RETURNABLE JAN. 8, 1962, IS FOR A DECLARATION OF WHETHER THERE HAS BEEN A GENERAL APPEARANCE BY DEFENDANT IN THE NEW YORK ACTION - the very point the Justice was interested in learning. Said petition purposefully stated that
>
> > 'defendant' (plaintiff herein) presented to the Supreme Court of the State of New York. . . . . .in the action instituted by her in. . . . .New York an 'Order for Pendente Lite Relief' and 'a notice of motion based upon her affidavit attached thereto.'
>
> "NOWHERE do the said papers indicated in any way the purpose of plaintiff's motion herein was for a finding on the status of defendant in the New York Court - a finding which could be made only in the New York Courts - WHICH status was a material issue TO THE PROPER CONSIDERATION AND DECISION of the motion before the same Justice in the State of New Jersey and said Justice had so stated.
>
> "Furthermore according to my client when Justice Concilio had requested to know if there had been a general appearance by defendant in the New York

Courts - defendant's New Jersey attorney (plaintiff in the New Jersey action) had stated in bad faith that there had not."

On December 4, 1962, a decision of Justice Klein, Exhibit D-7 in Evidence was entered. Here again, other things, he stated: "Defendant appeared specially and moved to set aside service of process herein."

On December 12, 1962, an order was signed by Justice Klein, Exhibit D-8 in Evidence. This order recites the previous proceedings which were had before him and in conformity with his previous decisions. However on page two thereof appears these words: "after the vacating of his special appearance". This court has examined his decisions very carefully and cannot find any such determination therein. This order, by the way, directs, among other things, payment of counsel fees, and custody of the infant child.

The defendant herein next appears before Justice Frederick E. Backer, for him to make a determination whether plaintiff herein had entered a general appearance in the New York matter. This hearing was ex parte. The plaintiff herein did not appear, nor participate therein. This court has, with the help of the voluminous file the defendant herein furnished to it, which by the way is not what the court requested, examined the matters listed in the Justice's order. Exhibit D-1 in Evidence. This court finds that there is nothing in said file, nor that plaintiff herein, either himself or by his New York attorney, which would indicate that he entered a general appearance by participating in the case actively and arguing it on the merit. *Hammond v. Hammond,* 190 N.Y.S. 2d 739 (Sup. Ct. A.D. 1959) and the cases cited therein. See also *Lynch v. Pleach,* 167 N.Y.S. 2d 885 (Sup. Ct. 1957), Aff. 168 N.Y.S. 2d 620, (1957) relative to motion to vacate a warrant of attachment and service of summons and complaint. This court also finds that the findings of Justice Backer is not res judicata and that this court is not bound thereby as it is not such a finding that this court has to give full faith and credit to it under the U.S. Constitution. See *Edwards v. Edwards supra.*

This court further examined the file of the defendant herein, referred to above, to ascertain if it could, what transpired at the hearing before Justice Thomas A. Aurelio on November 4, 1963. The judgment entered as a result of that hearing, which was ex parte, is Exhibit D-10 in Evidence. The transcript of that hearing is most enlightening. On page 5 of the transcript there appears:

> "MR. ROTHMAN: At this time, if your Honor please, I would like to offer in evidence Judge Klein's order in this court dated September 25, 1962, with respect to domicile and residence.
>
> THE WITNESS: That is Judge Backer's order.
>
> MR. ROTHMAN: That is Judge Backer's order, if your Honor please, determining that the defendant had appeared generally and that the domicile and residence are within the State, this State.
>
> THE WITNESS: Determining that he had in person jurisdiction, my husband. That was an order of general appearance.
>
> MR. ROTHMAN: I would like to offer that, if I may, your Honor.
>
> THE COURT: Where was he served?
>
> MR. ROTHMAN: In New Jersey.
>
> THE COURT: The order will be marked in evidence here. I think I have it.
>
> THE WITNESS: If your Honor please, may I tell the things preceding that so you know what is going on?
>
> THE COURT: I just want to make a proper record here.
>
> THE WITNESS: Because I am a lawyer, I am able to do that.
>
> THE COURT: I understand that. Did you say the September 25th order of Judge Klein?
>
> MR. ROTHMAN: No, this is an order of Judge Backer.
>
> THE WITNESS: At this time I will offer the orders in evidence that we are going to offer. It may help you to understand the background.

After we served the summons and complaint in this action, the defendant came in and made a motion to vacate the service of the summons and complaint on the ground that he didn't believe that the domicile was in the State of New York."

On page 12 of transcript there appears:

THE COURT: Put Judge Backer's order in evidence. *It seems to me that a Justice of this court has already ruled on the question and I cannot overrule him.* The remedy was by an appeal to the Appellate court. There was no appeal from this order. Am I right in that?

MR. ROTHMAN: No, your Honor.

THE COURT: And this order stands?

MR. ROTHMAN: That is right. It is the law of the case.

THE COURT: Then let the order be deemed marked in evidence.

(Order by the Honorable Frederick E. Backer, dated January 11, 1963, received in evidence and deemed marked plaintiff's Exhibit 1.)

THE COURT: *If you have the order of Judge Backer, I think I am bound by it at this point.*

It is to be noted that Justice Aurelio felt bound by an order of his associate on the bench, Justice Backer. It is also to be noted from that testimony that the orders signed by Justice Klein were never presented to Justice Aurelio when he heard this matter ex parte.

(C) This Court is not too impressed with the contention made by the defendant herein that since she commenced an action in the New York Court, prior to the time the defendant commenced his action here, it should have priority. Where the courts have held this principle to apply, it was based upon a finding by the New Jersey Court that the foreign court first obtained jurisdiction both over the subject matter and over the parties. *Stultz v. Stultz,* 15 N.J. 315 (1954); *Hammer v. Hammer,* 36 N.J. Super. 265 (App. Div. 1955), *Edwards v. Edwards supra.*

This court finds that the New York Supreme Court did not have jurisdiction of both parties.

This court therefore concludes it has jurisdiction to hear the matter before it. The motion to dismiss the complaint is accordingly denied and the restraint of the plaintiff entered herein is vacated.

IV

The motion by the defendant herein to vacate an order dated August 14, 1962 and a supplemental order thereto are both denied.

The restraints previously entered in this matter against the defendant are continued.

Justice Oliphant speaking for our Supreme Court in *Stultz v. Stultz, supra*, stated:

> "Where there is a voluntary submission to the foreign jurisdiction there is no ground for intervention by the New Jersey courts, or rather there is no ground unless there be a special equity justifying such relief notwithstanding the appearance. The policy of this court with respect to the exercise of such equitable jurisdiction in situations as here presented was stated by Mr. Justice Heher in *O'Loughlin v. O'Loughlin*, 6 N.J. 170, pp. 178, (1951):
>
> > "There can be no doubt of the power of a court of equity to impose restraints upon persons within the control of its process against action beyond the State. Ordinarily, a citizen of a State may go abroad for such remedies and relief as may be available in the jurisdiction of his choice, but a court of equity has the undoubted power to enjoin those subject to its jurisdiction from seeking relief in a foreign proceeding which would not be compatible with equity and right conscience. The restraint is directed against the litigants, not the foreign jurisdiction. It constitutes an exercise of equity's jurisdiction in personam operative upon those within the reach of the court's process. The remedy of injunction acts in personam. But though

> the power is unquestionable, its exercise is often one of great delicacy; it is a remedy that is sparingly used, to serve the ends of justice in the particular case. Considerations of comity forbid interference with the prosecution of a proceeding in a foreign jurisdiction capable of affording adequate relief and doing complete justice, unless there be a special equity sufficient in conscience to stay the hand of the defendant. The question is not the existence of the power but the propriety of its exercise in a given case. The rule of comity is grounded in the policy or avoiding conflicts of jurisdiction, unless upon strong grounds, and the general principle that the court which first acquires jurisdiction of the issue has precedence." Cf. Goodrich on Conflict of Laws (1949), sec. 78, p. 219; Strumberg on Conflict of Laws (2d ed. (1951), pp. 71, 73, 100, 104.
>
> "We specifically indicated our adherence to this doctrine in the following cases: *Peff v. Peff,* 2 N.J. 513, 521, 522 (1949); *O'Loughlin v. O'Loughlin, supra; Staedler v. Staedler,* 6 N.J. 380, 392 (1951); *Robison v. Robison,* 9 N.J. 288, 291 (1952); *Isserman v. Isserman,* 11 N.J. 106, 113 (1952)."

To recapitulate this Court concludes (1) that plaintiff, Sidney H. Joffe, is domiciled in New Jersey and that his son, Philip Lewis Joffe, was born in New Jersey and remained in New Jersey until his mother, the defendant herein, removed him to New York; (2) that this court has jurisdiction to decide the issue of custody and (3) that full faith and credit need not be given to the proceedings commenced by the defendant herein in the Supreme Court of New York as the plaintiff herein was never served with process in New York, never appeared generally, nor did he actively participate or argue the merits of that action.

The motions made by the defendant are denied and the restraint previously entered by this court against plaintiff is vacated.

Now, several orders to show cause why the defendant herein should not be held in contempt have not been heard by me. The reasons being that I felt that the motions made by the defendant herein should be decided first and that since I signed most of the orders that I should disqualify myself from hearing the same.

When I wrote this opinion I was of the opinion that I was still going to be assigned to hear other matrimonial matters. Judge David Nimmo has been assigned by the Chief Justice to hear these motions. Now, as Judge Duffy has been assigned to hear matrimonial matters in this county, probably both of you should communicate with him and get an early date.

This court also wants to remind the defendant herein that she has filed no answer. She should do so in accordance with the rules of our court.

Let an appropriate order be submitted to the court either by consent or by motion.

MR. RUBENSTEIN: In other words, contempt motions are being assigned to Judge Nimmo unless it is reassigned to Judge Duffy?

THE COURT: Yes.

MR. RATNER: May I at this time ask your Honor to make a ruling or enter an order that the matters of contempt be suspended unless the court of appeals—I say this respectfully—determines the propriety or the correctness of your rulings that this court has jurisdiction over the parties in the suit of plaintiff against the defendant?

THE COURT: I think you can make that. I think you can. I don't think you make that motion before me. I think you make that before the appellate division.

MR. RATNER: I have got to make it first here and then to the appellate division.

THE COURT: Well, to facilitate matters I will deny it. You get what I mean?

MR. RATNER: Yes. I will present the order.

MR. RUBENSTEIN: Oral motion was made and denied.

MR. RATNER: Right, for a stay.

MR. RUBENSTEIN: You made an oral application and was denied.

MR. RATNER: The court must know the purpose of the stay.

MR. RUBENSTEIN: Yes, I understand.

MR. RATNER: All right.

May at this time respectfully ask the court for a reasonable counsel fee for the services rendered to this lady in this extensive and voluminous litigation?

THE COURT: I will not allow any counsel fee at this time. I think it should abide, wait until the issue is finally determined.

MR. RATNER: Then may I reserve the right to come back to whatever judge is then sitting, if it be the proper procedure, to renew my application for a fee before him?

THE COURT: You always have that right.

MR. RATNER: No question since by right to come back to you to make the application.

THE COURT: Anything that I have decided here in Passaic County unfortunately I still have control over it. It isn't like in New York. You make the motion over in Morris County.

MR. RATNER: As long as I know where I am going that is all.

THE COURT: Well, that is something that I don't know.

MR. RATNER: I mean that I can make the application to you.

THE COURT: That's right.

APPENDIX C

ORDER OF CONTEMPT OF JUDGE VINCENT C. DUFFY ENTERED IN SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, SIDNEY H. JOFFE, PLAINTIFF V. GUSSIE JOFFE, DEFENDANT, DOCKET NO. M 6660-61, ENTERED OCTOBER 20, 1964

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, PASSAIC COUNTY
DOCKET NO. M 6660 61

SIDNEY H. JOFFE, Plaintiff,	)	
v.	)	CIVIL ACTION
GUSSIE JOFFE, Defendant.	)	ORDER OF CONTEMPT

This matter being opened to the court by J. Mortimer Rubenstein, Esq., attorney for plaintiff, in the presence of Benjamin Ratner, Esq., attorney for defendant, and it appearing to the court that, by an Order made in this action on the 11th day of August 1964, the said defendant was ordered to show cause at the Chancery Chambers in the City of Paterson, why she should not be adjudged guilty of contempt of this court as charged and punished therefor, and for other relief, and the court having read and considered the Affidavits of the plaintiff filed herein, and heard and considered the argument of counsel, and it now appearing that the said Gussie Joffe is guilty of the contempt charged in that she has willfully violated the Orders of this court mentioned in said Petition;

And it further appearing that the various Orders violated by the defendant as set forth in said Petition of the plaintiff, were duly served upon the defendant and she had knowledge of the contents thereof, and it further appearing

that the court has personal jurisdiction over the defendant, Gussie Joffe, and good cause appearing therefor:

It is on this 20th day of October 1964, ORDERED and ADJUDGED, that the said Gussie Joffe is guilty of civil contempt of this court, in that she has willfully violated the Order for Temporary Restraint entered in this cause on September 21, 1962, which restrained the defendant, her agents, servants and attorneys from proceeding in any manner whatsoever with a suit instituted by the said defendant in the Supreme Court of the State of New York, County of New York, Special Term, Part No. 12, Index 30789, 1962, and the Orders of Restraint contained in the Orders of this court dated January 4, 1963, August 14, 1963, November 24, 1963; February 20, 1964 and March 16, 1964.

It is further ORDERED, that the said Gussie Joffe, be committed to the County Jail of the County of Passaic, or to such other jail in this State wherein she may be apprehended, and there remain charged with her contempt until she shall vacate any Orders or Judgments obtained by her in the action instituted by her in the Supreme Court of the State of New York, County of New York, Special Term, Part No. 12, Index 30789, 1962, which Orders or Judgments were taken, instituted or obtained on and after September 21, 1962, and to also pay to the Clerk of this court a fine of $25.00 to the use of the State, unless the court shall see fit sooner to discharge her.

It is further ORDERED, that the said defendant, Gussie Joffe, forthwith take all necessary actions to vacate any orders or judgments obtained by her in the action instituted by her in the Supreme Court of the State of New York as above set forth, which Orders or Judgments were taken, instituted or obtained on and after September 21, 1962.

It is further ORDERED, that the warrant for the apprehension of the said defendant in accordance with this Order shall not issue until the further order of this court in order to give the defendant time within which to vacate the Orders and Judgments obtained by her in the said proceedings in

the Supreme Court of the State of New York as above set forth, which Orders or Judgments were taken, instituted or obtained on and after September 21, 1962, and that if proof be made to this court within 30 days following the date hereof, that the said defendant, Gussie Joffe, shall have failed and neglected to vacate said Orders and Judgments as above set forth, the plaintiff may take an Order, without notice, that a warrant issue for the commitment of the defendant as aforesaid.

It is further ORDERED, that custody of the infant child of the marriage, Philip Lewis Joffe, be and the same is hereby awarded to the plaintiff, Sidney H. Joffe, pendente lite and until the further order of the Court, the defendant to have rights of reasonable visitation with said infant child.

It is further ORDERED, that if the parties cannot agree upon said visitation and upon application of either party to the Court, for it to fix the terms and conditions of said visitation.

s/ VINCENT C. DUFFY
J.S.C.
Temporarily Assigned

Nov. 12, 1964

SECOND ORDER OF CONTEMPT FILED IN SUPERIOR COURT OF NEW JERSEY

This matter being opened to the court by J. Mortimer Rubenstein, Esq., attorney for plaintiff, and in the presence of Benjamin M. Ratner, Esq., attorney for defendant, and it appearing to the court that by Orders made in this action on January 4, 1963, August 14, 1963, September 24, 1963, November 21, 1963, February 20, 1964, March 16, 1964 and July 13, 1964, the said defendant was ordered to show cause why she should not be adjudged guilty of contempt of this court as charged in the Petitions dated January 4,

1963, August 14, 1963, September 24, 1963, November 21, 1963, February 20, 1964, March 16, 1964 and July 13, 1964, respectively, and punished therefor, and for other relief, and upon various Notices of Motion filed by the defendant to strike said Petitions and Orders to Show Cause, and the court having read and considered the Affidavits of the plaintiff filed herein and of the defendant, and heard and considered the argument of counsel, and it now appearing that Gussie Joffe is guilty of the contempt charged in that she has willfully violated the Orders of this court mentioned in said Petitions;

And it further appearing, that the various Orders violated by the defendant as set forth in said Petitions of the plaintiff, were duly served upon the defendant and she had knowledge of the contents thereof, and good cause appearing therefor:

It is on this 12th day of November 1964, ORDERED and ADJUDGED, that the said Gussie Joffe is guilty of civil contempt of this court in that she has willfully violated the Order for Temporary Restraint entered in this cause on September 21, 1962 which restrained the defendant, her agents, servants and attorneys from proceeding in any manner whatsoever with the suit instituted by the said defendant in the Supreme Court of the State of New York, County of New York, Special Term, Part No. 12, Index 30789, 1962, and the Orders of Restraint contained in the Orders of this court dated January 4, 1963, August 14, 1963, November 21, 1963, February 20, 1964 and March 16, 1964, and of the Order of this court entered December 19, 1962 insofar as it granted to the plaintiff visitation with the infant child of the marriage.

It is further ORDERED, that the defendant, Gussie Joffe, pay to the Clerk of this court a fine of $2,500.00 to the use of the State by virtue of her violation of the Order of this court entered December 19, 1962 insofar as is granted to the plaintiff visitation with the infant child of the marriage, and the sum of $500.00 to the use of the State for

her violation of the various Orders of Restraint as above set forth.

It is further ORDERED, that the defendant, Gussie Joffe, forthwith take all necessary actions to vacate any orders or judgments obtained by her in the action instituted by her in the Supreme Court of the State of New York, as above set forth, which orders or judgments were taken, instituted or obtained on and after September 21, 1962.

It is further ORDERED, that, in the event the said defendant shall fail to pay the said fines as above set forth and shall have failed to vacate the Orders and Judgments obtained by her in said proceedings in the Supreme Court of the State of New York as above set forth, which Orders or Judgments were taken, instituted or obtained on and after September 21, 1962, within 30 days following the date hereof, and upon filing of proof with this court that said action has not been taken within this time, the said Gussie Joffe be committed to the County Jail of the County of Passaic, or to such other jail in this State wherein she may be apprehended, and there remain charged with her contempt until she shall have vacated any Orders or Judgments obtained by her in the action instituted by her in the Supreme Court of the State of New York, County of New York, Special Term, Part No. 12, Index 30789, 1962, which Orders or Judgments were taken, instituted or obtained on and after September 21, 1962 and shall have paid the fines to the Clerk of this court as above set forth, unless the court shall see fit sooner to discharge her.

It is further ORDERED, that the defendant's motions to strike the various Orders to Show Cause issued in this matter as above set forth, be dismissed.

s/ DAVID A. NIMMO
J. S. C.
Temporarily Assigned

APPENDIX D

Memorandum Decision of New York Supreme Court (Justice Klein) Denying Husband's Motion to Dismiss for Lack of Jurisdiction and Finding Jurisdiction in New York (September 17, 1962)

Joffe vs. Joffe—Plaintiff has commenced an action for separation and in connection therewith now moves for alimony pendente lite and counsel fees. By separate motion (No. 6, August 27, 1962) defendant-husband appears specially and seeks to vacate and set aside service of process upon him pursuant to section 237a of the Civil Practice Act. From a reading of the voluminous affidavits submitted, although there appears to be some conflict with respect to exactly where the parties maintained their principal residence, if any, sufficient competent proof had been set forth herein to readily indicate that plaintiff satisfies the jurisdictional requirements with respect to New York residence outlined in section 1165a, subdivision 3 of the Civil Practice Act, without the necessity of conducting a formal hearing thereon before the court or a referee with the attendant delay that such a hearing might entail. The motion to vacate service of process is, accordingly, denied with leave to defendant to serve his answer or otherwise move with respect to the complaint within ten days after service of a copy of the order to be served herein with notice of entry thereof. Leave is also granted defendant to serve his answering affidavits in opposition to the motion for temporary alimony within the aforedescribed ten-day period. The motion to vacate service having been denied, plaintiff's motion (No. 7 August 27, 1962) for a vacature of the stay has been rendered academic, by virtue of said denial and the same is accordingly, denied. Pending the coming in of defendant's answering affidavits, disposition of the motion in chief for alimony pendente lite and counsel fees will be held in abeyance. In the interim, the receiver of defendant's seques-

tered funds is directed, upon service of a copy of the order, to be settled herein with notice of entry thereof, to pay all mortgage and tax payments recently due and/or about to become due on the jointly owned home of the parties, together with the payments currently due for the recent kitchen repairs. The receiver is further directed to pay out of the sequestered funds in his possession the sum of $69. per week for the support of the infant issue of the parties, inclusive of the salary of the nurse-said. Settle order.

Joffe vs. Joffe—Motion is disposed of in accordance with determination of companion motion decided simultaneously herewith.

ARTHUR G. KLEIN

Dated September 17, 1962

APPENDIX E

Order Granting Support and Counsel Fees Pendente Lite and Custody, etc. (New York Supreme Court–Justice Klein–December 12, 1962)

Plaintiff having moved this Court for an Order allowing her a counsel fee herein and awarding her custody of the infant issue of the marriage between the parties herein during the pendency of this action and for temporary alimony for the maintenance and support of said infant, and for such other and further relief as to this Court may seem just and proper and said motion having come on regularly to be heard by notice of motion,

Now, on reading and filing the order to show cause, dated July 12, 1962, the affidavits of Gussie Joffe, sworn to June 1, 1962, Yvonne Edwards, sworn to May 24, 1962, Taft Jones, sworn to June 18, 1962, Jesse Rothman, sworn to July 11, 1962, Svala Kristensdottir, sworn to June 15, 1962 and all the supporting papers attached hereto, as well as all of the exhibits attached hereto and upon the summons and complaint and upon the defendant's notice of motion to vacate service of process dated August 14, 1962, and upon the affidavit of Sidney H. Joffe sworn to on August 14, 1962, together with the exhibits thereto in support of said motion, and upon notice of cross-motion of the plaintiff dated August 17, 1962 together with the affidavit of Gussie Joffe, sworn to on August 15, 1962, together with the exhibits, and the affidavits of Taft Jones, Jr., sworn to August 16, 1962; and the affidavit of Lee Kleiman, sworn to August 16, 1962, and the supplemental affidavit of Gussie Joffe, sworn to August 20, 1962 and the supplemental affidavit of Gussie Joffe, sworn to August 27, 1962, in opposition to defendant's motion and upon the affidavit of Jesse Rothman, sworn to August 24, 1962 in support of plaintiff's cross-motion and upon the reply affidavits of Sidney H. Joffe, sworn to August 22 and August 23, 1962, respectively and upon the affidavit of Benjamin M. Lichten-

stein, sworn to August 23, 1962 in opposition to plaintiff's cross-motion; and upon the Order of this Court dated September 25, 1962, and defendant's motion having been denied, and defendant having moved for reargument and reargument having been granted and motion denied and defendant having been granted leave to serve his answer or otherwise move with respect to the complaint within ten days after service of a copy of the order to be settled therein and defendant, after the vacating of his special appearance, having been granted leave within the ten day period aforesaid to serve his formal answering affidavits in opposition to the motion for alimony pendente lite and defendant's application for reargument having been denied (Sept. 25, 1962) and a copy of the order denying the motion to vacate the proceedings having been served upon his counsel on September 27, 1962 and the time within which defendant was to serve the formal answering affidavits having long since expired, and defendant having failed to submit any answer and disposition of the motion having heretofore been held in abeyance pending the coming in of defendant's formal answering affidavits, and due deliberation having been had herein and the opinion of the Court having been duly filed, and

Now on motion of Jesse Rothman, attorney for the plaintiff herein, it is

Ordered, that the motion for alimony and counsel fees is granted on default, and it is further

Ordered, that the defendant be and he hereby is directed to pay to the plaintiff, at the office of her attorney, Jesse Rothman, 475 Fifth Avenue, New York, New York, the sum of $2,500 as and for counsel fee herein, one-half of which sum is directed to be paid within fifteen days after

service of a copy of this order with notice of entry thereof and the balance when the cause appears on the Ready Calendar, and it is further

ORDERED, that custody of the infant Philip Lewis Joffe the issue of the marriage between the parties hereto, be and the same hereby is awarded to the plaintiff, until the final order of this Court, and it is further

ORDERED, that the defendant be and he hereby is directed to pay to the plaintiff at 475 Fifth Avenue, New York, New York the sum of $275 per week alimony during the pendency of this action for the support and maintenance of said infant and herself which payments are to commence from the original return day of the motion herein, the 22nd day of July, 1962, and it is further

ORDERED, that in addition to the foregoing, the defendant is directed to continue making all mortgage and tax payments due and to become due on the home owned by the entirety by the parties, said payments to be made directly to the plaintiff by check made payable to the mortgagee and/or to the Tax Department, of the City of Montclair, or to the mortgagee, whichever way the mortgagee requires, and it is further

ORDERED, that the defendant be and he hereby is granted the right of visitation of the said infant as follows:

Defendant shall have reasonable rights of visitation at the home of the plaintiff, 44 East 67th Street, New York, New York every Sunday from 9 to 5.

ORDERED, that a copy of this order herein be served upon the receiver of defendant's sequestered property.

ORDERED, that this order or decree may be enforced or modified only in the New York State Supreme Court.

ENTER

A. G. K.
J.S.C.

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK

Order Declaring General Appearance (New York Supreme Court—Justice Backer—January 11, 1963)

Plaintiff having moved this Court for an order adjudging and determining that the defendant herein by appearing, moving and arguing on the merits of this law suit and by becoming an actor herein, has participated on the merits and submitted to the general jurisdiction of this Court, though he labelled his appearance as "appearing specially" and that this Court has now personal jurisdiction over him, and for such other and further relief as to this Court may seem just and proper, and said motion having come on to be heard by notice of motion.

Now, on reading and filing the notice of motion dated December 24, 1962, the affidavit of Gussie Joffe, sworn to the 25th and 28th days of December, 1962 and the affidavit of Jesse Rothman, duly sworn to the 3rd and 7th days of January 1963 and upon all of the proceedings heretofore and herein and upon all of the papers filed in the office of the County Clerk indexed as No. 30789/1962 in the case of Joffe v. Joffe and particularly the Plaintiffs:

Plaintiff's:

Order of sequestration dated the 21st day of June, 1962 signed by Mr. Justice Francis X. Conlon with attached affidavits of Gussie Joffe, Jack Kleiman, duly sworn to the 18th day of June, 1962.

Order to show cause for alimony and counsel fees and custody of the infant dated the 12th day of July, 1962 signed by Mr. Justice Flynn, the affidavits of Gussie Joffe, sworn to June 1, 1962, Yvonne Edwards, sworn to May 24, 1962, Taft Jones, sworn to June 18, 1962, Jesse Rothman, sworn to July 11, 1962, Svala Kristenscottir, sworn to June 15, the

summons and complaint, with supporting papers and exhibits.

Order to show cause dated August 8, 1962, signed by Miss Justice Birdie Amsterdam and the affidavits attached of Gussie Joffe, sworn to the 24th days of July, 1962, for permission to withdraw funds from sequestered assets of defendant, the supplementary affidavits thereto sworn to the 24th day of August, 1962, signed by Gussie Joffe.

Defendant's:

Notice of motion to vacate service of process dated August 14, 1962 together with affidavits of Sidney H. Joffe sworn to August 14, 1962 with exhibits questioning jurisdiction of the person and subject manner.

Plaintiff's:

Cross-motion dated August 17, 1962 to vacate any stay together with affidavit of Gussie Joffe, sworn to August 15, 1962, Taft Jones, Jr., sworn to August 16, 1962, Lee Kleiman, sworn to August 16, 1962 and two supplemental affidavits of Gussie Joffe sworn to August 20th and 27th, 1962, in opposition to defendant's motion and affidavit of Jesse Rothman, sworn to August 24, 1962, in support of plaintiff's cross-motion and

Defendant's:

Two affidavits of defendant sworn to August 22, 1962 and the affidavit of Benjamin M. Lichtenstein, sworn to August 23, 1962, the affidavit of Sidney H. Joffe sworn to August 30, 1962, addressed to the three above motions of plaintiff and in support of his own motion,

upon the argument before the Court on the four above motions with defendant's counsel appearing in court and upon the

Defendant's:

Motion for reargument by letter dated the 19th day of September, 1962 in which he argued on the merits seven of the motions theretofore before the Court and reargument having been granted and motion denied and upon

Defendant's:

Submission of a proper order with notice of settlement wherein he submitted such order with direction directed toward the motion to remove monies from sequestered funds and further giving directions as to jurisdiction of subject matter and person and directing as to leave to put in his answering affidavits as to alimony and counsel fees motion giving dispositive orders to the receiver to pay monies to the infant issue of the parties herein, and

Upon the order of Mr. Justice Klein, dated December 12, 1962 wherein he stated as to the special appearance of the defendant on the said above mentioned motions:

"defendant, after vacating of his special appearance, having been granted leave within the ten day period aforesaid to serve his formal answering . . ." (ten days after service of copy of order)

and upon:

The Receiver's:

Order to show cause dated 1st and 8th days of October, 1962, signed by Mr. Justice Morris E. Spector to punish the defendant's trustee for contempt for

failure to turn funds over to the receiver together with annexed affidavit of the receiver, Frank Turnbull, sworn to September 29, 1962, affidavits of Murray H. Klinger, sworn to October 5, 1962 and October 16, 1962, and upon

Defendant's:

And upon the argument by defendant of the said motion before Mr. Justice Chimera upon the return day, October 23, 1962 and the adjourned return day October 30, 1962, and

Defendant's:

Order to show cause incorporating the contempt motion and requesting the Court to vacate the entire sequestration order or so much of it as would apply to that portion for which the trustee was being held in contempt, signed by Mr. Justice Morris E. Spector, dated the 19th day of October, 1962 together with annexed affidavit of Sidney H. Joffe sworn to the 19th day of October, 1962; of the Attorney for the Receiver, Murray H. Klinger, his associate, sworn to the 23rd day of October, 1962.

and upon oral argument by defendant's attorney of said motions before Mr. Justice Chimera on the adjourned return day, and upon the letter mailed by defendant's New Jersey attorney, showing a purported assignment of defendant and upon

Plaintiff's:

Order to show cause to stay the defendant from proceeding in New Jersey dated the 5th day of September, 1962, signed by Mr. Justice George Tilzer together with plaintiff's supporting affidavits dated the 31st day of August and the 22nd day of October, 1962 and the affidavits of Jesse Rothman, sworn to October 1, 1962, and upon

Defendant's:

Answering affidavits signed by Benjamin Lichtenstein, sworn to September 28, 1962 and J. Mortimer Rubenstein, New Jersey attorney for defendant, duly sworn to the 27th day of September, 1962 and filing with this Court a copy of the New Jersey Court order, and upon

The order of Mr. Justice Klein dated the 12th day of December, 1962 wherein he *struck the special appearance* of the defendant, and upon all the pleadings and proceedings theretofore had herein, all of the appearances of defendant's counsel labelled "special" or otherwise and all of the extensions of time, arguments and rearguments of motions heretofore had herein and all other papers, exhibits, supporting papers and the following court orders in addition to those hereinbefore enumerated,

Order of Mr. Justice Francis X. Conlon dated June 21, 1962

Order of Mr. Justice John L. Flynn, dated June 12, 1962

Opinion of Mr. Justice Thomas C. Chimera filed Nov. 9, 1962 and Order of said date

Order of Mr. Justice Thomas C. Chimera filed Nov. 9, 1962 (companion order to aforesaid order)

Order of Mr. Justice Klein dated September 25, 1962

Memorandum of Mr. Justice Klein filed September 25, 1962 (dated September 11, 1962)

Order of Mr. Justice Arthur G. Klein dated December 12, 1962 (pursuant to memorandum decision filed Dec. 4, 1962

Order of Mr. Justice Thomas C. Chimera dated Nov. 7, 1962

Order of Mr. Justice Thomas Aurelio dated Jan. 3, 1963.

And the Court having reviewed the entire file and papers therein and based upon the papers before it, the opinions of the various Justices, the filed orders and all the other pleadings and proceedings heretofore had herein. And this said motion having come on to be heard before me the 8th day of January, 1963 and the defendant having filed no papers in opposition fo this motion except a copy of an order dated Jan. 4, 1963 issued by the Superior Court of New Jersey, Chancery Division, Passaic County in a case entitled Sidney H. Joffe, plaintiff v. Gussie Joffe, defendant and a copy of a petition on which it was based issued Passaic County, and defendant having otherwise defaulted herein,

Now on motion of Jesse Rothman, attorney for the plaintiff, herein it is

Ordered and declared that the defendant by his participation in the case as set forth more fully herein has appeared generally herein, and it is further

Ordered and declared that the defendant has submitted himself generally to the jurisdiction of this Court conferring in personam jurisdiction over his person in the within action.

Enter

F. H. B.
J.S.C.

APPENDIX G

Findings of Fact and Conclusions of Law Supporting Separation Decree (New York Supreme Court—Justice Aurelio—December 2, 1963)

The above-entitled action having been brought on for hearing at Special Term, Part 12 of this Court, held in and for the County of New York at the County Courthouse in the City of New York on the 4th day of November, 1963, and on reading and filing the summons and verified complaint and the affidavit of service of William J. Tillie verified the 2nd day of July, 1962, from which it appears the summons and complaint were duly personally served outside the State upon the defendant above-named; and on reading and filing the order of Mr. Justice Arthur G. Klein dated the 12th day of December, 1962, which vacated the special appearance of the defendant after denying his motion to vacate service and gave him leave to file his answer to the complaint; and after reading and filing the order of Mr. Justice Frederick E. Backer dated the 11th day of January, 1963, which made a specific declaratory ruling that the defendant had appeared generally herein by his attorney Benjamin M. Lichtenstein, Esq., of 332 East 149th Street, Bronx, New York, after arguing the merits of the case on several motions and that this Court had in personam jurisdiction of the defendant, and it appearing that defendant has defaulted in the service of an answer herein and more than twenty (20) days have elapsed since the service of the summons and complaint herein and the date in which leave was granted to defendant by M. Justice Klein's order of December 12, 1963 to put in his answer and the time to answer having expired and not having been extended by further stipulation or order, and after hearing the allegations and proof of the plaintiff, I find and decide as follows:

Findings of Facts

1. That jurisdiction as provided for by Section 230 of the Domestic Relations Law has been obtained. That this Court has acquired in personam jurisdiction of the defendant by reason of his general appearance as set forth in the January 11th, 1964 order of Mr. Justice Frederick E. Backer incorporated into and made a part of this record together with all of the affidavits, exhibits and proceedings attached to same.

2. From the evidence educed, plaintiff and defendant were domiciled in the State of New York from the inception of the marriage throughout the entire marriage to the date hereof and the matrimonial res is and has at all times been and so remains in the State of New York. The infant issue of the parties has since birth been domiciled in the State of New York.

3. No answer has been served and the defendant has defaulted.

4. There is one infant issue of the marriage, namely Philip Lewis Joffe, born July 23, 1958.

5. That defendant inflicted cruel and inhuman treatment upon plaintiff.

6. That defendant abandoned plaintiff in the summer of 1961 when he refused to cohabit with her.

7. Defendant has totally failed and refused to support plaintiff and the infant since May 1, 1962.

8. That defendant is capable of paying $500 per week support to plaintiff and the infant.

9. That defendant is in arrears of $5,696 for alimony and support payments pendente lite and mortgage and tax

payments heretofore ordered paid together with attorneys fees in the amount of $2500.

10. That plaintiff paid for and is the owner of all furniture and furnishings listed on a certain schedule of "Exhibit 9" in evidence on the hearing of this case and is entitled to sole and separate use of said furniture, furnishings and personalty listed in said exhibit.

Conclusions of Law

1. Plaintiff is entitled to a judgment separating the plaintiff from the bed and board of the defendant forever because of defendant's cruel and inhuman treatment, abandonment and non-support of her and the infant issue of the marriage.

2. Plaintiff is entitled to custody of the infant issue of the parties with rights of visitation afforded the defendant every Sunday between 9:00 A.M. and 5:00 P.M., but at no time is he to remove the child from the jurisdiction of this Court.

3. Plaintiff is entitled to receive from the defendant the sum of $500 per week for support and maintenance of herself and support and maintenance and education of the infant issue of the parties ($300 of said sum being allocated to the wife and $200 of said sum being allocated to the infant).

4. That plaintiff is the sole owner of all furniture, furnishings and personalty purchased by her and that given to her as gifts by the defendant as listed and indicated on "Exhibit 9" in evidence on the hearing of November 4, 1963.

5. Plaintiff is entitled to judgment against the defendant in the sum of $5,696 for arrears of alimony and support

payments and the sum of $2500 attorney's fees previously awarded and unpaid.

6. Plaintiff is entitled to have the sequestration and receivership continued for the benefit of the plaintiff and infant issue of the marriage until further order of this Court.

7. The Court finds that both plaintiff and defendant were bona fide residents and domiciliaries of the State of New York from the date of the marriage, throughout the entire marriage to the date of entry of judgment herein; that the matrimonial res is and has been at all times since the marriage in the State of New York and continues so to be; that the infant issue has since birth and continues to be a domiciliary and native of the State of New York.

8. That the defendant has appeared generally in this action by his attorney, Benjamin M. Lichtenstein, Esq. and that this Court has in personam jurisdiction over his person.

LET Judgment be entered accordingly.

Dated: New York, December 2nd, 1963.

THOMAS A. AURELIO
Justice of the Supreme Court
of the State of New York.

Final Judgment of Separation (New York Supreme Court—Justice Aurelio—December 2, 1963)

The above-entitled action having been brought by plaintiff for a judgment of separation separating plaintiff from the bed and board of defendant forever on the ground of cruel and inhuman treatment, abandonment and non-support of the plaintiff, by the defendant, and the defendant having been duly personally served with the summons and verified complaint in this action outside the State of New York, and the defendant having appeared generally in this action by his attorney Benjamin M. Lichtenstein, Esq. of 332 East 149th Street, Bronx, New York, giving this Court in personam jurisdiction of his person, and it appearing that defendant was wilfully defaulted in the service of an answer herein, and that more than 20 days have elapsed since the time in which he was given leave to serve his answer, and his time to answer having expired and not having been further extended herein by stipulation or Court order, and this matter having been duly brought on for hearing at Special Term, Part XII of this Court before Honorable Thomas A. Aurelio, one of the Justices of this Court on the 4th day of November, 1963, and the plaintiff having appeared by Jesse Rothman, Esq. of 475 Fifth Avenue, New York City, her attorney, and presented her verified complaint, proof of service of the summons and complaint upon the defendant and an affidavit of regularity of this proceeding; and the allegations and proofs of the plaintiff having been heard, and plaintiff have moved to conform the pleadings to the proof and the said motion having been granted; and the Court having made and filed its decision in writing stating separately the facts found and the conclusions of law and having decided among other things that plaintiff is entitled to a judgment against the defendant separating her from the bed and board of the defendant forever;

NOW ON MOTION OF JESSE ROTHMAN, attorney for plaintiff it is

ORDERED, ADJUDGED AND DECREED that the plaintiff Gussie Joffe be and she hereby is separated forever from the bed and board of the defendant, Sidney H. Joffe as prayed for in the complaint herein because of the cruel and inhuman treatment, abondonment and non-support of plaintiff by defendant, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant shall have the right to have visitation of Philip Lewis Joffe, the issue of the marriage every Sunday of each week commencing on the 22nd day of November, 1963, between the hours of 9:00 A.M. and 5:00 P.M.; but at no time is he to remove the said child from the jurisdiction of the said Court; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff have the care and custody of Philip Lewis Joffe an infant, the issue of said marriage, and it is further

ORDERED, ADJUDGED AND DECREED and found by this Court that both plaintiff and defendant were domiciliaries of the State of New York continuously throughout the entire marriage to the date of the entry of judgment herein, that the matrimonial res has been at all times since the marriage in the State of New York and continues so to be and the infant has since birth been domiciled in the State of New York, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff is to receive from the defendant the sum of $500 per week for support and maintenance of herself and support and maintenance and education of the infant issue of the parties ($300 of said sum being allocated to the plaintiff and $200 to the infant issue), and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff is the sole owner of all furniture, furnishings and personalty listed as paid for by her or given as gifts to her as indicated in

the various schedules of "Exhibit 9" in evidence on the hearing of November 4, 1963, and it is further

ORDERED, ADJUDGED AND DECREED that the receivership be continued for the benefit of the plaintiff and issue of the marriage as set forth in Mr. Justice Conlon's order of this Court of June 21, 1962, until the further order of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that judgment is hereby entered against defendant in favor of plaintiff for the sum of $5,696 representing arrears of alimony and support pendente lite and the sum of $2500 attorney's fees making a total sum of $8,196.00 awarded previously by the Court, and it is further

ORDERED, ADJUDGED AND DECREED that this decree may be enforced or modified only in the Supreme Court.

ENTER

T. A. A.
J.S.C.

JAMES McGURRIN
Clerk

FILED
Dec. 3, 1963
New York
County Clerk's Office